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CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

KISHA SHEPHARD, Plaintiff and Appellant, v. LOYOLA MARYMOUNT UNIVERSITY et al., Defendants and Respondents.	B150210 (Super. Ct. No. BC228705)

APPEAL from a judgment of the Superior Court of Los Angeles County, Mel Red Recana, Judge. Affirmed.

Haney, Buchanan & Patterson, Steven H. Haney, and Colleen A. Déziel for Plaintiff and Appellant.

Burke, Williams & Sorensen, Harold A. Bridges and H. Esther Kim for Defendants and Respondents Loyola Marymount University and Julie Wilhoit.

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* Pursuant to California Rules of Court, rules 976(b) and 976.1, this opinion is certified for publication with the exception of parts III.C.-F.

I. INTRODUCTION

Plaintiff, Kisha Shephard, appeals from a summary judgment entered in favor of defendants, Loyola Marymount University (the school) and Julie Wilhoit, on a complaint for race discrimination and breach of oral contract. The lawsuit arose out of the school's refusal to renew plaintiff's athletic scholarship and her removal from the women's basketball team. Defendants' summary judgment motion was brought and granted on grounds: plaintiff's cause of action for race discrimination in violation of the Fair Employment and Housing Authority Act ("FEHA") (Gov. Code,[1] § 12960 et seq.) was barred as a matter of law because she was a student athlete and not a school employee; Ms. Wilhoit was not liable for damages because there is no individual liability under the FEHA; plaintiff's contract claim was barred by the statute of frauds; and plaintiff failed to exhaust her administrative remedies. Plaintiff opposed the summary judgment motion on its merits but also requested a continuance because of ongoing discovery proceedings. In addition, plaintiff requested leave to amend her complaint to assert fraud and negligent misrepresentation claims. The trial court denied the continuance and leave to amend requests but granted the summary judgment motion. In the published portion of this opinion, we address the question of whether plaintiff was an employee for purposes of the FEHA. We conclude plaintiff was not a school employee, she was a student who could not sue under the FEHA. Our decision is based solely on California statutory law. No constitutional question has been raised. No issue of federal law has been presented by plaintiff which controls the resolution of her FEHA claim. No issue has been raised as to the application of the anti-discrimination provisions of Title IX, 42 United States Code section 2000d. We affirm.

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[1] All further statutory references are to the Government Code unless otherwise indicated.

II. BACKGROUND

On April 21, 2000, plaintiff filed her complaint against defendants alleging causes of action for race discrimination (first) and breach of oral contract (second). The complaint alleged that Ms. Wilhoit, who is Caucasian, was the school's head women's basketball coach. Plaintiff, who is an African-American, was an All-American basketball star at Crenshaw High School in Los Angeles. She was highly recruited by a numerous Division I colleges. Plaintiff decided to attend the school based on promises that she would receive a four-year scholarship.

The complaint alleged that, while plaintiff was attending the school, Ms. Wilhoit engaged in a pattern and practice of creating and maintaining a racially discriminatory and hostile environment. Ms. Wilhoit frequently made racial remarks to plaintiff. The racial remarks included statements that plaintiff had a "'ghetto mentality'" and she "'should run away'" when police officers entered the gym during a practice. In May 1999, an unsigned letter from an anonymous concerned alumni sent to the school described some of the racial discrimination by Ms. Wilhoit directed at plaintiff and other players. Within days of of the receipt of this letter, Ms. Wilhoit removed plaintiff from the team. Furthermore, it was alleged Ms. Wilhoit ordered the school to revoke plaintiff's scholarship. Plaintiff alleged that the discriminatory action violated the FEHA, which prohibits employers or their agents from discriminating against their employees on the basis of race. It was alleged that: plaintiff's scholarship was revoked because of her race; the school condoned and ratified Ms. Wilhoit's actions; plaintiff lost substantial benefits valued at a minimum of $26,000 a year; and she lost medical benefits and future lost earnings. In the second cause of action, plaintiff alleged that in 1997, she and the school entered into an oral contract for her scholarship to be automatically renewed for four years. The terms of the contract were partially set forth in a written document.

Defendants answered the complaint and moved for summary judgment. In the summary judgment motion, which was filed January 25, 2001, defendants argued

summary judgment was required because plaintiff was not entitled to damages under the FEHA because she was not a school employee.

III. DISCUSSION

A. Standard of Review of an Order Granting Summary Judgment on the Merits

In *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850-851, the Supreme Court described the burden of production on summary judgment motions as follows: "[F]rom commencement to conclusion, the party moving for summary judgment bears the burden of persuasion that there is no triable issue of material fact and that he is entitled to judgment as a matter of law. That is because of the general principle that a party who seeks a court's action in his favor bears the burden of persuasion thereon. [Citation.] There is a triable issue of material fact if, and only if, the evidence would allow a reasonable trier of fact to find the underlying fact in favor of the party opposing the motion in accordance with the applicable standard of proof. . . . [¶] [T]he party moving for summary judgment bears an initial burden of production to make a prima facie showing of the nonexistence of any triable issue of material fact; if he carries his burden of production, he causes a shift, and the opposing party is then subjected to a burden of production of his own to make a prima facie showing of the existence of a triable issue of material fact. . . . A prima facie showing is one that is sufficient to support the position of the party in question. [Citation.]"

We review the trial court's decision to grant the summary judgment de novo. (*Johnson v. City of Loma Linda* (2000) 24 Cal.4th 61, 65-66, 67-68; *Sharon P. v. Arman, Ltd.* (1999) 21 Cal.4th 1181, 1188, disapproved on another point in *Aguilar v. Atlantic Richfield Co.*, *supra*, 25 Cal.4th at p. 853, fn. 19.) The trial court's stated reasons for granting summary judgment are not binding on us because we review its ruling not its rationale. (*Szadolci v. Hollywood Park Operating Co.* (1993) 14 Cal.App.4th 16, 19; *Barnett v. Delta Lines, Inc.* (1982) 137 Cal.App.3d 674, 682.)

B. Plaintiff Was Not an Employee for FEHA Purposes

Plaintiff contends the trial court erroneously found her FEHA claim was without merit because triable issues of material fact existed as to whether she was a school employee. The FEHA prohibits employment discrimination on certain enumerated classifications, one of which is on the basis of race. (§§ 12920, 12926, 12940.) The FEHA provides limited definitions of the terms "employee" and "employer." (§ 12926, subds. (c) & (d).) Section 12926, subdivision (c) states, "'Employee' does not include any individual employed by his or her parents, spouse or child, or any individual employed under a special license in a nonprofit sheltered workshop or rehabilitation facility." As can be noted, section 12926, subdivision (c) only provides a description of what is *not* an employee. Employer is defined as follows: "'Employer' includes any person regularly employing five or more persons, or any person acting as an agent of an employer, directly or indirectly, the state or any political civil subdivision of the state, and cities, except as follows: [¶] 'Employer' does not include a religious association or corporation not organized for private profit." (§ 12926, subd. (d).) The first paragraph of section 12926, subdivision (d) does provide some definition of an employer. But the second paragraph of section 12926, subdivision (d) provides a description of what is *not* an employer. Beyond these limited definitions, the FEHA does not define an employer, employee, or what constitutes employment. In order to recover under the discrimination in employment provisions of the FEHA, the aggrieved plaintiff must be an employee. No decisional authority has addressed the specific issue of whether a student athlete, who receives an athletic scholarship, is a school employee under the FEHA.

However, persuasive decisional authority in the workers' compensation and public entity liability contexts provides guidance as to the meaning of the term "employee." Labor Code section 3352, subdivision (k) excludes a student athlete receiving an athletic scholarship from the term employee. What is now Labor Code section 3352, subdivision (k), resulted from the Court of Appeal decision in *Van Horn v. Industrial*

Acc. Com. (1963) 219 Cal.App.2d 457, 464-467 (*Van Horn*), a workers' compensation case. In *Van Horn*, a student athlete received financial assistance from Cal Poly San Luis Obispo in exchange for playing football. Some of the money paid to the student was in the form of an athletic scholarship, which was funded by a booster club. The student was killed in an airplane crash while returning from an out-of-state football game against Bowling Green University. The student's heirs applied for workers' compensation death benefits on the theory that the decedent was an employee of Cal Poly San Luis Obispo. (*Id*. at pp. 460-463) The Court of Appeal held that the student had an employment contract with the college and that his heirs were entitled to workers' compensation benefits. (*Id*. at pp. 464-468.) The decision was premised on the theory the student's agreement to play football for Cal Poly San Luis Obispo was a contract to "render services" within the meaning of workers' compensation law. (*Id*. at pp. 465-466.) However, *Van Horn* also stated: "It cannot be said as a matter of law that every student who receives an 'athletic scholarship' and plays on the school athletic team is an employee of the school. To so hold would be to thrust upon every student who so participates an employee status to which he has never consented and which would deprive him of the valuable right to sue for damages. Only where the evidence establishes a contract of employment is such inference reasonably to be drawn. [Citation.]" (*Id*. at p. 467.)

In 1965, in response to *Van Horn*, the Legislature amended Labor Code section 3352 to add former subdivision (j) to exclude athletic participants as employees. As originally adopted, the exclusion of scholarship athletes from the definition of the term employee was as follows in former Labor Code section 3352, subdivision (j): '"Employee' excludes . . . : [¶] . . . [¶] (j) Any person, other than a regular employee, participating in sports or athletics who receives no compensation for such participation other than the use of athletic equipment, uniforms, transportation, travel, meals, lodgings or other expenses incidental thereto." (Stats. 1965, ch. 1791, § 1, pp. 4127-4128; see *Graczyk v. Workers' Comp. Appeals Bd.* (1986) 184 Cal.App.3d 997, 1002, 1005-1006

[detailing legislative amendments to Labor Code section 3352 since the *Van Horn* decision to "clarify the exclusion of athletic participants" as employees] (*Graezyk*).) The purpose of the 1965 amendment was described as follows, "[The] amendment evidenced an intent on the part of the Legislature to prevent the student-athlete from being considered an employee for any purpose which could result in financial liability on the part of the university." (*Townsend v. State of California* (1987) 191 Cal.App.3d 1530, 1537 (*Townsend*); *Graczyk v. Workers' Comp. Appeals Bd.*, *supra*, 184 Cal.App.3d at pp. 1002, 1005-1006.) Labor Code section 3352, subdivision (j), the original student athlete exclusion from the scope of the term employee, was later recodified and is now found in subdivision (k). Labor Code section 3352, subdivision (k) now states in pertinent part: "'Employee' excludes . . . : [¶] (k) Any student participating as an athlete in amateur sporting events sponsored by any public agency, public or private nonprofit college, university or school, who receives no remuneration for the participation other than the use of athletic equipment, uniforms, transportation, travel, meals, lodgings, scholarships, grants-in-aid, or other expenses incidental thereto."

In *Townsend v. State of California*, *supra*, 191 Cal.App.3d at pages 1534-1537, the Court of Appeal extended the *Grarcyz* analysis from the worker's compensation context to a claim under the Tort Claims Act. (§ 810 et seq.) The facts in *Townsend* were as follows: "In a varsity basketball game between the University of California at Los Angeles (UCLA) and San Jose State University (San Jose State), a player for San Jose State, Ronald Lowe, [viciously] struck a UCLA player, Raymond Townsend, with his fists and inflicted physical injury. In a personal injury action filed by Townsend against Lowe and various other defendants, a jury awarded Townsend $25,000 as against Lowe. [¶] Before the matter was submitted to the jury, however, the trial court determined as a matter of law that defendant Lowe was not an employee of the State of California (State) and thus Townsend could not recover under the doctrine of respondeat superior against the other named defendants, i.e., the State, the athletic director and the coach at San Jose State." (*Townsend v. State of California, supra,* 191 Cal.App.3d at

p. 1532.) *Townsend* concluded that liability could not be imposed against the state because as a matter of law Mr. Lowe, the student athlete, who struck the plaintiff, was not an "employee" of San Jose State University. (*Id.* at pp. 1534-1537.) In so holding, *Townsend* relied on the Legislature's clear intent in amending Labor Code section 3352 following *Van Horn* to exclude a student athlete from the definition of an employee. (*Townsend v. State of California*, *supra*, 191 Cal.App.3d at pp. 1535-1537.) *Townsend* concluded that the determination of whether a student is an employee does not rest upon whether a student athlete is on scholarship and attending a private or public institution. (*Id*. at pp. 1534, 1537.) *Townsend* stated: "It is a matter of common knowledge that colleges and universities in California, in varying degrees, maintain athletic programs which include a number of sports, such as golf, tennis, swimming, track, baseball, gymnastics and wrestling. It is also well known that of all the various sports programs, at least in California, only two, i.e., basketball and football, generate significant revenue. These revenues in turn support the other nonrevenue producing programs. [¶] Thus, conceptually, the colleges and universities maintaining these athletic programs are not in the 'business' of playing football or basketball any more than they are in the 'business' of golf, tennis, or swimming. Football and basketball are simply part of an integrated multisport program which is part of the education process. Whether on scholarship or not, the athlete is not 'hired' by the school to participate in interscholastic competition. [Citation.] [Footnote omitted.]" (*Id*. at p. 1536; see *Munoz v. City of Palmdale* (1999) 75 Cal.App.4th 367, 371-372.) No reason exists to distinguish the reasoning of *Graczyk* and *Townsend* from the facts of this case.

Furthermore, the National Collegiate Athletic Association (NCAA) Constitution and Bylaws were explicitly incorporated by reference into the financial aid agreements executed by plaintiff. These rules clearly provide that plaintiff was not a school employee. Article 2.9 of the NCAA Constitution provides, "Student-athletes shall be amateurs in intercollegiate sport, and their participation should be motivated by education and by the physical, mental and social benefits to be derived. Student participation in

intercollegiate athletics is an avocation . . . ." NCAA Bylaw article 12.01.1 provides, "Only an amateur student-athlete is eligible for intercollegiate athletics participation in a particular sport." NCAA Bylaw article 12.01.4 provides, "A grant-in-aid administered by an educational institution is not considered to be pay or the promise to pay for athletic skill, provided it does not exceed the financial aid limitations set the Association's membership." NCAA Bylaw article 12.02.2 defines "pay" as follows, "Pay is the receipt of funds, awards or benefits not permitted by the governing legislation of the Association for participation in athletics." NCAA Bylaw article 15.02.4.1 defines "scholarships" and "grants" as financial aid. NCAA Bylaw article 12.02.3 defines a professional athlete as follows, "A professional athlete is one who receives any kind of payment, directly or indirectly for athletics participation except as permitted by the governing legislation of the Association." Under these standards, plaintiff's argument that she received compensation would have rendered her ineligible to play. Moreover, plaintiff signed the financial aid agreements, which specifically characterized the aid and scholarships as neither pay nor a promise to pay.

Although not dispositive, as defendants point out, both federal and California income tax statutes specifically exclude "qualified scholarships" from gross income. (26 U.S.C. § 117(a) ["Gross income does not include any amount received as a qualified scholarship by an individual who is a candidate for a degree at an educational organization"]; Rev. & Tax. Code, § 17131 ["Part III of Subchapter B of Chapter 1 of Subtitle A of the Internal Revenue Code, relating to items that are specifically excluded from gross income, shall apply, except as otherwise provided." (Fn. omitted.)].)

Finally, the application of traditional statutory construction principles warrants the conclusion that a student athlete is not a school employee. Statutes relating to the same subject matter must be harmonized insofar as is possible. (*Chevron U.S.A., Inc. v. Workers' Comp. Appeals Bd.* (1999) 19 Cal.4th 1182, 1195; *Walnut Creek Manor v. Fair Employment & Housing Com.* (1991) 54 Cal.3d 245, 268.) Further, the Supreme Court has held, "'"[W]hen words used in a statute have acquired a settled meaning through

judicial interpretation, the words should be given the same meaning when used in another statute dealing with analogous subject matter; this is particularly true, where . . . both statutes were enacted for the welfare of employees and are in harmony with each other." [Citation.]' [Citation.]" (*Torres v. Parkhouse Tire Service, Inc.* (2001) 26 Cal.4th 995, 1005, citing *Ventura County Deputy Sheriffs' Assn. v. Board of Retirement* (1997) 16 Cal.4th 483, 496, fn. 16.) These rules of statutory interpretation construing different statues in pari materia are regularly applied in contexts analogous to the present one. (*Oscar Mayer & Co. v. Evans* (1979) 441 U.S. 750, 756 ["Since the [Age Discrimination in Employment Act of 1967] ADEA and Title VII share a common purpose, the elimination of discrimination in the workplace, since the language of § 14(b) is almost in haec verba with § 706(c), and since the legislative history of § 14(b) indicates that its source was § 706(c), we may properly conclude that Congress intended that the construction of § 14(b) should follow that of § 706(c)."]; *American Airlines, Inc. v. County of San Mateo* (1996) 12 Cal.4th 1110, 1129-1130 [statutes granting a right in other transportation contexts pertinent to whether an airline can pursue a private right of action under the Airport and Airway Improvement Act of 1982].) Labor Code section 3352, subdivision (k) defines the term "employee" in the context of defining benefits available to injured workers. Common sense suggests these statutes, Labor Code section 3352, subdivision (k) and the FEHA, both of which are designed to provide workplace protections for employees should be construed together in a harmonious fashion.

One additional thought is in order to terms of statutory construction issues. Statutes are to be construed so to avoid absurd or unreasonable results. (*Diamond Multimedia Systems, Inc. v. Superior Court* (1999) 19 Cal.4th 1036, 1047; *California School Employees Assn. v. Governing Board* (1994) 8 Cal.4th 333, 340.) To adopt plaintiff's construction of the FEHA, one that specifically eschews the application of Labor Code section 3352, subdivision (k), would lead to an absurd or unreasonable result. Under plaintiff's construction, a student athlete would be an employee for

purposes of the FEHA. But, a student athlete would not be an employee for purposes of workers' compensation benefits or government tort liability. Plaintiff has pointed to no legislative history materials nor any valid public policy which would support such an unreasonably divergent construction of California law.

[Parts III.C.-F. are deleted from publication.
See *post* at page 20 where publication is to resume.]

C. The Oral Misrepresentations Claims

Plaintiff's second cause of action alleged that defendants breached an oral contract to provide a four-year athletic scholarship. The statute of frauds as embodied in Civil Code section 1624, subdivision (a)(1) prohibits enforcement of "[a]n agreement that by its terms is not be performed within a year from the making thereof" unless the agreement "or some note or memorandum thereof, are in writing and subscribed by the party to be charged or by the party's agent. . . ." The Supreme Court has limited Civil Code section 1624, subdivision (a)(1) as follows: "In *White Lighting Co. v. Wolfson* (1968) 68 Cal.2d 336 [], we held that this portion of the statute of frauds 'applies only to those contracts which, by their very terms, cannot be performed within one year.' (*Id.* at p. 343.)" (*Foley v. Interactive Data Corp.* (1988) 47 Cal.3d 654, 671.) Because the complaint alleged that plaintiff would receive a four-year athletic scholarship, enforcement of such an oral promise would violate the statute of frauds. (Civ. Code, § 1624, subd. (a)(1).)

Plaintiff nevertheless argues that summary judgment was unwarranted because there were disputed material issues of fact concerning promissory estoppel principles. The established rule is that an estoppel to rely on the statute of frauds will not arise unless the plaintiff will suffer unconscionable injury or defendant will be unjustly enriched. (*Ruinello v. Murray* (1951) 36 Cal.2d 687, 689; *Munoz v. Kaiser Steel Corp.* (1984) 156 Cal.App.3d 965, 972 ["'To state a cause of action based on unconscionable injury it is

not enough to allege that plaintiff gave up existing employment to work for the defendant. [Citations.] [Plaintiff] must set forth [the] rights under the contract given up and show that they were so valuable that unconscionable injury would result from refusing to enforce the oral contract with defendant. [Citations.]' The touchstone under California is unjust enrichment of the party to be estopped or unconscionable injury to the other party. [Citations.]" (Italics omitted.)].)

The undisputed evidence does not support an estoppel to enforce the statute of frauds. Defendants' evidence shifted the burden of production to plaintiff. (*Merril v. Navegar, Inc.* (2001) 26 Cal.4th 465, 476-477; *Aguilar v. Atlantic Richfield Co., supra,* 25 Cal.4th at pp. 854-855.) Plaintiff did not sustain her burden of production. First, plaintiff did not establish unjust enrichment of the defendants. Plaintiff was a college student for two academic years. During the two years, she received financial aid of approximately $26,000 per year. Plaintiff produced no evidence that $52,000 did not adequately compensate her. The Supreme Court has held, "No unjust enrichment results when the promisee has received the reasonable value of [her] services." (*Ruinello v. Murray*, *supra*, 36 Cal.2d at p. 690; *Munoz v. Kaiser Steel Corp.*, *supra*, 156 Cal.App.3d at p. 972.)

Second, as a matter of law, it is not unconscionable to apply the statute of frauds to preclude enforcement of an alleged oral contract, which directly conflicts with the written agreement. (*Tomlinson v. Qualcomm, Inc.* (2002) 97 Cal.App.4th 934, 946-947; *Slivinsky v. Watkins-Johnson Co.* (1990) 221 Cal.App.3d 799, 806-807; see also *Malmstrom v. Kaiser Aluminum & Chemical Corp.* (1986) 187 Cal.App.3d 299, 318-319 [although not deciding issue on statute of frauds ground, unconscionable injury for promissory estoppel cannot be based on undisputed facts which establish reliance on representations that contradict written policies was not justified].) The documents filed in support of the summary judgment motion establish that there is no material dispute as to the duration of the written contracts between the parties. The school's Student Athlete Manual sets forth its policy that athletic grants are offered "for one year only and must be

renewed annually" pursuant to NCAA regulations. The school's Athletics Department Staff Manual provides: "[N]o athletic scholarship can be awarded in excess of one year." NCAA rule 15.3.3.1 provides: "One-Year Limit. Where a student's athletic ability is taken into consideration in any degree in awarding financial aid, such aid shall not be awarded in excess of one academic year." Furthermore, the grants in aid, which were executed by plaintiff, for the academic years 1997-1998 and 1998-1999 provide in part: "This Athletic Grant-in-Aid is offered . . . for a period of one academic year . . . . This award is made in accordance with the provisions of the Constitution of the National Collegiate Athletic Association (NCAA) pertaining to the principles of amateurism, sound academic standards, financial aid to student athletes and satisfactory progress toward a degree."

Thus, the allegations of the complaint are contrary to all express written terms of the duration of the financial aid in the documents executed by plaintiff. The undisputed evidence establishes that the oral misrepresentations attributed to Ms. Wilhoit directly conflict with the written financial aid agreements and written policies of the school. For purposes of statute of frauds estoppel analysis, plaintiff's reliance on the representations was neither reasonable nor justified because they directly contradict express written documents executed by her and the school's policy manuals. (*Tomlinson v. Qualcomm, Inc., supra,* 97 Cal.App.4th at pp. 946-947; *Slivinsky v. Watkins-Johnson Co., supra,* 221 Cal.App.3d at pp. 806-807; see also *Malmstrom v. Kaiser Aluminum & Chemical Corp., supra,* 187 Cal.App.3d at pp. 318-319.) As a result, the trial court correctly determined that the breach of oral contract claim was without merit because it violated the statute of frauds. Further, the trial court correctly concluded defendants were not estopped to assert the statute of frauds. Defendants were entitled to summary judgment.

D. The Proposed Additional Misrepresentation Claims

We also disagree with plaintiff's assertion that, notwithstanding the existence of the written agreement contradicting the oral representations, she is entitled to reversal because the trial court refused to allow her to amend her complaint to add causes of

action for fraud and intentional and negligent misrepresentation. We examine the order denying an amendment motion under the deferential abuse of discretion standard of review. (*Record v. Reason* (1999) 73 Cal.App.4th 472, 486 ["'[T]he trial court has wide discretion in allowing the amendment of any pleading [citations], [and] as a matter of policy the ruling of the trial court in such matters will be upheld unless a manifest or gross abuse of discretion is shown.'"]; *American Advertising & Sales Co. v. Mid-Western Transport* (1984) 152 Cal.App.3d 875, 880 ["An appellate court will not interfere with the denial of a motion to amend unless an abuse of discretion is manifest."].) Generally, the statute of frauds may bar enforcement of an oral contract. But, the statute of frauds does not bar a cause of action for fraud based on an oral misrepresentation. (*Tenzer v. Superscore, Inc.* (1985) 39 Cal.3d 18, 28-31; see *Phillippe v. Shapell Industries* (1987) 43 Cal.3d 1247, 1260 ["We held in *Tenzer* that an *unlicensed real estate finder*, was entitled to invoke the doctrine of equitable estoppel against a statute of frauds defense"] (Italics original.).) However, plaintiff is nonetheless not entitled to prevail on her assertion that the trial court abused its discretion in denying her amendment request to allege fraud and deceit claims.

First, we may simply disregard plaintiff's assertion because it is not supported by any legal argument and citation to authority. (*People v. Stanley* (1995) 10 Cal.4th 764, 793; *Reyes v. Kosha* (1998) 65 Cal.App.4th 451, 466, fn. 6; *Kim v. Sumitomo Bank* (1993) 17 Cal.App.4th 974, 979.) Second, without abusing its discretion, the trial court could hold plaintiff's reliance on the oral representations, which were contradicted by the written agreements, was unreasonable. The existence of the written agreement, which directly contradicts the alleged oral representations, generally presents an insurmountable burden for a plaintiff's misrepresentation claim. (See *Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 340, fn. 10 [express employment contract in writing signed by a party cannot be overcome by proof of an implied understanding that contradicts written agreement]; *Starzynski v. Capital Public Radio, Inc.* (2001) 88 Cal.App.4th 33, 38; *Malmstrom v. Kaiser Aluminum & Chemical Corp., supra*, 187 Cal.App.3d at pp. 318-

319; *Shapiro v. Wells Fargo Realty Advisors* (1984) 152 Cal.App.3d 467, 482.) Generally, reliance on representations that contradict a written agreement is unreasonable. (*Tomlinson v. Qualcomm, Inc.*, *supra*, 97 Cal.App.4th at pp. 946-947; *Slivinsky v. Watkins-Johnson Co.*, *supra*, 221 Cal.App.3d at pp. 806-807; *Malmstrom v. Kaiser Aluminum & Chemical Corp.*, *supra*, 187 Cal.App.3d at p. 319; *Shapiro v. Wells Fargo Realty Advisors*, *supra*, 152 Cal.App.3d at p. 482.) Any causes of actions directly contradicting the express written terms could not have been brought because they would have been barred as a matter of law. (*Banco do Brasil, S.A. v. Latian, Inc.* (1991) 234 Cal.App.3d 973, 1009-1011; *Price v. Wells Fargo Bank* (1989) 213 Cal.App.3d 465, 483-486.) Accordingly, the trial court did not abuse its discretion in denying plaintiff's motion to amend her complaint to allege fraud based claims.

E. The Continuance Motion

In addition to opposing the summary judgment motion, plaintiff moved for continuance of the hearing. Plaintiff argues it was an abuse of discretion to refuse her request. Pursuant to Code of Civil Procedure section 437c, subdivision (h), a continuance may be granted as follows: "If it appears from the affidavits submitted in opposition to a motion for summary judgment or summary adjudication or both that facts essential to justify opposition may exist but cannot, for reasons stated, then be presented, the court shall deny the motion, or order a continuance to permit affidavits to be obtained or discovery to be had or may make any other order as may be just." The decision to grant or deny the request is a matter within the broad discretion of the trial court. (*Bahl v. Bank of America* (2001) 89 Cal.App.4th 389, 395-396; *Aguimatang v. California State Lottery* (1991) 234 Cal.App.3d 769, 803-804.) The party requesting a continuance must make a factual showing that evidence necessary to oppose the summary judgment or adjudication motion may exist but cannot be presented. (*Fisher v. Gibson* (2001) 90 Cal.App.4th 275, 283; *Bahl v. Bank of America*, *supra*, 89 Cal.App.4th at p. 397; *Roth v.*

Rhodes (1994) 25 Cal.App.4th 530, 548.) The requisite showing is established by affidavit that facts essential to justify opposition may exist. (*Fisher v. Gibson*, *supra*, 90 Cal.App.4th at p. 283; *Bahl v. Bank of America*, *supra*, 89 Cal.App.4th at p. 397; *Roth v. Rhodes*, *supra*, 25 Cal.App.4th at p. 548.) The continuance is not mandatory, however, where a party seeking further delay fails to make the required showing by affidavit. (*Bahl v. Bank of America*, *supra*, 89 Cal.App.4th at p. 393; *Scott v. CIBA Vision Corp.* (1995) 38 Cal.App.4th 307, 315, 326.) Furthermore, the proposed discovery proceedings must be relevant to a dispositive issue. (*Allyson v. Department of Transportation* (1997) 53 Cal.App.4th 1304, 1321.)

Plaintiff sought to take the depositions of several witnesses concerning evidence on issues of exhaustion of administrative remedies and the nature of the relationship between plaintiff and the school. The witnesses included: Ms. Wilhoit; Donna Palmer, the Director of Financial Aid; William Husak, the Athletic Director; Daniel Smith, the Compliance Director; and Katherine Charles, the Scholarship Coordinator. Plaintiff's counsel's affidavit stated Ms. Wilhoit's deposition was necessary because: Ms. Wilhoit was involved in and had personal knowledge of plaintiff's recruitment; Ms. Wilhoit made representations to plaintiff during recruitment process; she would testify as to the contract entered into by the parties; Ms. Wilhoit would describe the verbal and mental abuse inflicted on plaintiff; and Ms. Wilhoit could describe the racial discrimination experienced by plaintiff. Plaintiff's counsel declared that a deposition for Ms. Wilhoit had originally been scheduled for February 12, 2001, but was rescheduled at defendants' request. Plaintiff's counsel was in the process of rescheduling the deposition when she was served with the summary judgment motion in January 2001. Plaintiff's counsel further declared the depositions of other persons were necessary to establish reasons for the revocation of the "contract." Plaintiff wanted to depose the other witnesses to determine their level of personal knowledge of representations made to plaintiff and others by Ms. Wilhoit. The affidavit also stated that several witnesses, including former teammates, needed to be deposed about the recruitment process and the racial

discrimination of plaintiff. The dispute involved information about whether the school received federal and state funding because it would pertain to race discrimination pursuant to the Federal Civil Rights Act of 1964 and the Unruh Act (Civ. Code, § 51[2]). Plaintiff argues that the dispute should have been resolved prior to the trial court's ruling.

No abuse of discretion occurred. First, plaintiff's proposed depositions were related to the FEHA claim she was a school employee. Because the trial court correctly determined plaintiff was not a school employee, the FEHA cause of action was without merit. Depositions on that issue would not have assisted plaintiff in opposing the summary judgment motion. Accordingly, deposing these witnesses on issues related to the nature of the relationship would not have assisted plaintiff. The proposed discovery would not have led to evidence necessary to refute the dispositive issue in the case. (*Allyson v. Department of Transportation*, *supra*, 53 Cal.App.4th at p. 1321; *Scott v. CIBA Vision Corp.*, *supra*, 38 Cal.App.4th at pp. 324-326.) Plaintiff also argued that a continuance to present discovery on the exhaustion issue was warranted. But, further discovery on this issue would not have assisted plaintiff because the exhaustion issue was not dispositive. (*Allyson v. Department of Transportation*, *supra*, 53 Cal.App.4th at p. 1321; *Scott v. CIBA Vision Corp.*, *supra*, 38 Cal.App.4th at pp. 324-326.)

In addition, for the first time in the appeal, plaintiff claims that the additional depositions would have assisted her in a "racial discrimination" claim pursuant to the Federal Civil Rights Act of 1964 and the Unruh Act. Plaintiff did not plead any such causes of action in the complaint. Further, she did not request leave to amend the complaint to add alternative racial discrimination theories. Defendants, as they were required to do, only addressed the theory of race discrimination that was actually pled, an FEHA claim. (*Tsemetzin v. Coast Federal Savings & Loan Assn.* (1997) 57 Cal.App.4th

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2 Civil Code section 51, subdivision (b) provides: "All persons within the jurisdiction of this state are free and equal, and no matter what their sex, race, color, religion, ancestry, national origin, disability, or medical condition are entitled to the full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever.

1334, 1342-1343; *Lennar Northeast Partners v. Buice* (1996) 49 Cal.App.4th 1576, 1582.) In summary judgment litigation, the pleadings frame the issues to be decided because it is these allegations to which the motion must respond. (*Scolinos v. Kolts* (1995) 37 Cal.App.4th 635, 638-639; *Tsemetzin v. Coast Federal Savings & Loan Assn., supra,* 57 Cal.App.4th at pp. 1342-1343; *Leibert v. Transworld Systems, Inc.* (1995) 32 Cal.App.4th 1693, 1699.)

Plaintiff cannot now claim summary judgment should not have been granted because evidence supplied in opposition to the motion or that could have been explored in additional depositions would have assisted her in developing alternative theories that were neither raised nor pled. The Supreme Court explained recently: "'It is the duty of litigants to diligently prepare cases for trial and ordinarily they will not be allowed to gamble on the result of a trial by presenting one theory and then if judgment go against them get a new trial in order to try again for a favorable result under a different theory.'" (*Aguilar v. Atlantic Richfield Co., supra,* 25 Cal.4th at p. 866, fn. 35, quoting *Redwood Hatchery v. Meadowbrook Farms* (1957) 152 Cal.App.2d 481, 486.) Under such circumstances, no abuse of discretion occurred.

F. Plaintiff's Other Claims of Reversible Error

Plaintiff also claims the summary judgment must be reversed because the trial court erred in not ruling on her evidentiary objections. The argument is unavailing because plaintiff's evidentiary objections were waived by the failure to secure a ruling on them in the trial court. (*Ann M. v. Pacific Plaza Shopping Center* (1993) 6 Cal.4th 666, 670, fn. 1; *Sambrano v. City of San Diego* (2001) 94 Cal.App.4th 225, 234-238; *City of Long Beach v. Farmers & Merchants Bank* (2000) 81 Cal.App.4th 780, 783-784.)

Further, plaintiff claims the trial court violated Code of Civil Procedure section 437c, subdivision (g), which provides in part: "Upon the grant of a motion for summary judgment, on the ground that there is no triable issue of material fact, the court shall, by written or oral order, specify the reasons for its determination. The order shall

specifically refer to the evidence proffered in support of, and if applicable in opposition to, the motion which indicates that no triable issue exists. . . ." However, the Courts of Appeal have held, "A statement of reasons is sufficient if it allows for meaningful appellate review." (*Santa Barbara Pistachio Ranch v. Chowchilla Water Dist.* (2001) 88 Cal.App.4th 439, 448; *W.F. Hayward Co. v. Transamerica Ins. Co.* (1993) 16 Cal.App.4th 1101, 1110-1111 ["For purposes of meaningful appellate review (a key objective of subdivision (g) of section 437c), the court's statement of reasons is quite adequate. Certainly, there is no question about the reason this motion for summary judgment was granted."].)

In the case at bench, the order granting summary judgment specified the grounds on which the motion was granted. The trial court concluded that summary judgment was appropriate because the only two causes of action pleaded were without merit. Furthermore, the court listed specific reasons for granting summary judgment on the FEHA claim (plaintiff was not an "employee") and the breach of oral contract (the statute of frauds applied), which were dispositive of the action. In addition, the trial court did not rely on credibility determinations in making its decision and the issues were not so complex that we could not make a meaningful review of the order. The trial court's order clearly provided a sufficient statement for a meaningful review. Moreover, even if we were to conclude the order was not specific, reversal is neither automatic nor warranted. (*Santa Barbara Pistachio Ranch v. Chowchilla Water Dist.*, *supra*, 88 Cal.App.4th at pp. 448-449; *Soto v. State of California* (1997) 56 Cal.App.4th 196, 199; *Ruoff v. Harbor Creek Community Assn.* (1992) 10 Cal.App.4th 1624, 1627-1628.) As illustrated by this opinion, we considered the trial court's rulings in depth and are satisfied that summary judgment was appropriate.

[The balance of the opinion is to be published.]

IV. DISPOSITION

The summary judgment is affirmed. Defendants, Loyola Marymount University and Julie Wilhoit, are entitled to their costs on appeal from plaintiff, Kisha Shephard.

CERTIFIED FOR PARTIAL PUBLICATION

TURNER, P.J.

We concur:

GRIGNON, J.

ARMSTRONG, J.